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In the

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 1205.

THOMAS M. STUBBS, AS TRUSTEE IN BANKRUPTCY OF AMERICAN BOND & SHARE CORPORATION,

PETITIONER,

v.

FULTON NATIONAL BANK OF ATLANTA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

CLARENCE H. CALHOUN,
MADISON RICHARDSON,
WILLIAM A. SUTHERLAND,
Attorneys for Petitioner.

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FULTON NATIONAL BANK OF ATLANTA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Thomas M. Stubbs as Trustee in Bankruptcy of American Bond & Share Corporation respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause. Petitioner is hereinafter referred to as "Trustee," American Bond & Share Corporation as "bankrupt" and Respondent as "Bank."

OPINION BELOW.

The opinion of the Circuit Court of Appeals was rendered on January 6, 1945, and is reported at 146 F. (2d) 556.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 6, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. The time for filing this petition was extended to April 26, 1945 by order of this Court entered March 30, 1945.

QUESTION PRESENTED.

Where a corporation, for the purpose of inducing the public to make deposits for investment, falsely claims to have realized enormous earnings for its depositors, and where a national bank, which assists in financing the operations of the corporation, knows of said claims and the purpose for which they are made, and admittedly suspects their falsity—does the Bank thereby have notice of the intent of such corporation to defraud such depositors; or may the Bank accept such false statements of earnings as legitimate "puffing" or "seller's talk"?

STATUTES INVOLVED.

The Trustee sues under Section 70 (e) of the Bankruptcy Act as amended, 11 U. S. C. A., Sec. 110 (e):

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.

Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

The Georgia Fraudulent Conveyance Act[1] (Georgia Code of 1933, Section 28-201) provides:

"***Enumeration of void acts.*** The following acts by debtors shall be fraudulent in law against creditors and others, and as to them null and void, viz.:

. . . . . .

"2. Every conveyance of real or personal estate . . . had or made with intention to delay or defraud creditors, and such intention known to the party taking. A bona fide transaction on a valuable consideration, and without notice or ground for reasonable suspicion, shall be valid."

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In failing to hold that the Trustee was entitled to recover from the Bank for each of the transfers here involved because said transfers were fraudulent conveyances and void under the law of Georgia;

2. In holding that a false claim of enormous past earnings by a corporation inviting deposits from the public,

[1] That the fraudulent conveyances condemned by Section 70 (e) are conveyances fraudulent under State law is well settled. *Stellwagen v. Crum*, 245 U. S. 605, 614; *Anderson v. Gray*, 284 F. 770 (4) (CCA 5th); *Irving Trust Co. v. Finance Service Co.*, 63 F. (2d) 694 (CCA 2d); *Hale v. Hummel*, 64 F. (2d) 210, 212 (CCA 8th).

The Georgia law of fraudulent conveyances is based upon the statute of 13th Elizabeth. Practically all the States either treat that statute as part of the common law, or have adopted statutes more or less similar to the statute of 13th Elizabeth. 37 C. J. S., p. 852, Sec. 2.

which a large national bank, assisting in financing the corporation's operations, suspects to be false, may be accepted by the Bank as legitimate "puffing" or "seller's talk" so as not to constitute notice of fraud;

3. In holding that notice to a large national bank of the falsity of a claim of enormous past earnings for depositors, made by a corporation for the purpose of inducing deposits with it, does not, in and of itself, constitute notice of intended fraud upon the corporation's depositors, but may be accepted by the bank as legitimate "puffing" or "seller's talk";

4. In holding in effect that a false claim of enormous past earnings for its depositors, made by a corporation for the purpose of inducing deposits with it, does not, in and of itself, constitute fraud, but is permissible as "puffing" or "seller's talk" if the corporation is prospering and the amount of the earnings is merely "exaggerated".

STATEMENT OF THE CASE.

The error complained of in this petition is a pure error of law. No analysis of evidence as to disputed facts is necessary to a consideration of the errors assigned. The statement of facts here made is of undisputed facts which are appropriate to give the Court a proper background for the consideration of this single question of law.

This is a suit by a Trustee in Bankruptcy under Section 70 (e) of the Bankruptcy Act of 1898, as amended, to recover from the Bank the value of securities transferred by the bankrupt to the Bank in fraud of its creditors to secure six separate loans made by the Bank upon bankrupt's

securities,[2] to enable bankrupt to finance its operations, including the payment of certain large debts.

Bankrupt conducted a swindle of the familiar Ponzi type. It solicited deposits from the public, repayable on demand, allegedly for use in honest speculation on the customers' behalf, upon the false representation that Bradley, its president, possessed great experience and that it had had extraordinary success in trading in securities and commodities (R. 440-442). Such trading in securities as it in fact did was comparatively small and resulted in losses, not profits (R. 96, par. 10; 107). But, following the Ponzi technique, bankrupt made to every depositor, every month, down to the time of its collapse, a handsome payment falsely represented as his participation in "earnings", and employed deposits from subsequent depositors to pay "earnings" to earlier depositors (R. 209, 584-585). The larger part of the funds deposited with bankrupt did not go into speculation at all, but went to satisfy such payments to depositors of fictitious "earnings", to carry heavy overhead, and into substantial embezzlements by bankrupt's president, Bradley (R. 107, 132-133, 405).

The Securities and Exchange Commission began an in-

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[2] The dates of transfer, the value of securities transferred and the loans made by the Bank were as follows:

Date of Transfer	Value of Securities	Amount of Loan
December 21, 1933	$ 73,000.00	$ 55,000.00
January 9, 1934	50,000.00	40,000.00
January 25, 1934	12,000.00	8,000.00
April 24, 1934	6,000.00 (and securities not here involved)	5,255.62
May 19, 1934	15,000.00	9,357.60
June 1, 1934	4,500.00	2,684.50
(Date unknown)	10,000.00	.....
	$170,500.00	$120,297.82

vestigation early in 1935,[3] whereupon Bradley, bankrupt's president, fled; was later apprehended; pleaded guilty to using the mails to defraud, and was sent to the penitentiary (R. 133). Between January, 1933 and March, 1935, when it collapsed, bankrupt had received deposits from many hundreds of persons aggregating over half a million dollars, all except a trivial portion of which had been dissipated at the time of its collapse (R. 213).

The Court below apparently assumed the foregoing facts,[4] which were not in dispute, and considered that the sole issue was whether the Bank, which had paid value for the transfers to it, could establish that it took without notice[5] of the transferor's intent to defraud its depositors so as to be entitled to protection as a bona fide purchaser. The Court below held that the required notice was lacking

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[3] Bankrupt's deposit contracts, entitling customers to participate in the profits of its trading operations, constitute a "security" under the Securities Act of 1933, 15 U. S. C. A., Sec. 77 (b) (1) (R. 96, 279-280).

[4] Actually the opinion of the Court below nowhere states the fraud in which the bankrupt was engaged, although the sole issue in the case was that of fraudulent conveyance, intended fraud in the conveyance being the primary fact to be determined before the question of notice could arise. It seems most unusual that the Court should have attempted to consider the question of notice of fraud without any statement of the facts of fraud.

[5] *In the Court below nothing turned upon any distinction between "knowledge," or "notice" or "ground for reasonable suspicion" upon the port of the Bank; and we, therefore, use the terms herein interchangeably.* As the Court below apparently recognized, it is clear under the Georgia Fraudulent Conveyance Act (p. 3, supra) that "either notice, or grounds for reasonable suspicion, will be treated as equivalent to knowledge." *Palmour v. Johnson,* 84 Ga. 91, 99. The usual statement of the rule is that if the transfer is made to defraud, it is void if the transferee had "knowledge of such intention or reasonable grounds to suspect the same." *Dickson v. Citizens Bank & Trust Co.,* 184 Ga. 398 (2); *Hilburn v. Hightower,* 178 Ga. 534 (1); *Killebrew v. Smith,* 182 Ga. 117, 118; *Cunningham v. Avakian,* 192 Ga. 391 (1).

as to every transfer.[6] In considering the error in this holding, on which alone this petition for certiorari is based, it is not necessary to refer to the mass of undisputed evidence of suspicious circumstances that came to the Bank's knowledge.[7] It is sufficient for present purposes that the Court below found that the Bank's officers knew that the bankrupt was making claims of enormous earnings for past depositors for the purpose of inducing deposits from the public, and that the Bank admittedly suspected the falsity of such representations (R. 980). The error herein complained of is that the Court drew the erroneous legal conclusion that notice of these facts did not constitute notice of the intended fraud.

Knowledge of bankrupt's claims of enormous past earnings for depositors had come to the Bank, before any of the transfers, in a letter from bankrupt to the Bank dated September 8, 1933 (copied as Appendix A hereto, p. 17, infra) urging the Bank to desist from warning persons, inquiring of the Bank, not to deal with bankrupt, but on the contrary to represent to such persons that the Bank had knowledge that bankrupt was unusually successful and, to support this request, the bankrupt set out in the letter a statement of amounts which it claimed to have *"earned and paid"* to depositors each month since it began business in the preceding January. This statement from the letter follows:

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[6] The District Court had found notice as to the fifth and sixth transfers only (R. 417-418). The Master had found notice as to all of the transfers except the first. The Master's holding of no notice as to the first transfer was based expressly upon the ground that the Bank's president entertained a mistaken view of the law at the time of the first transfer which prevented it from having notice of bankrupt's fraudulent intention as to that transfer (R. 139).

[7] The important evidence on this point is summarized in Appendix B, p. 20, infra, should the Court be interested for any reason in considering it.

1933	Net Percentage Paid
January	20.24
February	10.12
March	14.72
April	17.02
May	11.04
June	10.58
July	6.44
August	8.28
Average per month over a period of eight months	12.30½

The Trustee assumed that where false representations of its past earnings were made by bankrupt to induce the public to invest, such false representations were necessarily fraudulent as to such investors; and further, that the Bank, if it had notice of the falsity of such representations, necessarily had notice of bankrupt's intended fraud upon such investors. However, the Court below—while finding that the Bank had notice that such representations were "exaggerated"—held that the Bank did not have notice of bankrupt's intended fraud; and this, for the reason that such "exaggeration," in the opinion of the Court below, amounted to no more than legitimate "puffing" or "seller's talk" (R. 980).[8]

The Court entirely ignored the fact that the statements made were of ascertainable facts and that the earnings were stated in odd and varying percentages per month, carried out to one one-hundredth (1/100th) of one percent (1%), to cause them to have the appearance of meticulously accurate statements of fact. The Court analogized such false or "exaggerated" claims to the unduly en-

[8] The Court euphemistically referred to the claims as "exaggerated," carefully avoiding the terms "false" or "fraudulent" (R. 980-981).

thusiastic claims of advertisers by press and radio for the quality or value of their commodities or services, as though the bankrupt had been proclaiming the superior virtues of a shaving cream or a beauty parlor or the value—not cost —of an alarm clock.

The key paragraph of the opinion is quoted in full:

> "*It is true that Bradley in a letter dated September 8, 1933, made claims to extravagant profits covering his dealings in the market over the months from January through August of that year. The bank officials admitted frankly that they suspected these claims to be* EXAGGERATED, but they testified that no one ever suspected or suggested that Bradley was engaged in fraudulent activities or that the transfers were made for the purpose of defrauding creditors. The bank made a rather thorough investigation which resulted in no information constituting a ground for suspicion. The bankrupt's main place of business was in Atlanta; it had hundreds of depositors, and at and during the time loans were made by the bank all depositors seemed satisfied; no complaints against Bradley or the bankrupt appear from the record; and Bradley, according to the record, enjoyed the general confidence of the community. Under these *favorable circumstances* it was natural for the bank to look upon his claim of earnings, *though* EXAGGERATED, as evidencing that the business carried on by him was prospering. *It is common practice for a seller to* EXAGGERATE *the value of his wares, and extravagant claims for a commodity or for a service offered to the public for sale occur daily through the press and over the radio; almost all who read and hear them know them to be exaggerated, but few, if any, associate the* EXAGGERATION *with fraud*" (R. 980-981). (Emphasis supplied.)

In the foregoing paragraph and elsewhere in its opinion the Court points out circumstances which it terms "favorable" to the Bank. Such "favorable" circumstances would

be of importance if, but only if, they *removed* the Bank's suspicion. Yet nowhere does the Court find or even intimate that the suspicion, which the Bank admittedly entertained, as to the falsity of bankrupt's claims of enormous earnings, was removed or in any degree lessened by these "favorable" circumstances.[9]

REASONS FOR GRANTING THE WRIT.

This petition for certiorari relies solely upon the error of law underlying the holding of the Court below that the Bank, in accepting the transfers in question, had no notice of bankrupt's intention to defraud its depositors.[10] The decision of the Court below is based squarely upon that Court's legal conclusion that notice to the Bank that bankrupt was soliciting from the public investment of funds on the basis of false statements of past earnings does not charge the Bank with notice of any intended fraud on the part of the bankrupt, but that such "exaggerated" statements may be accepted by the Bank as legitimate "puffing" or "seller's talk."

As a matter of logical necessity there is implicit in this

[9] Most of the evidence in the possession of the Bank, in addition to the letter claiming enormous earnings, was *highly unfavorable* to bankrupt (see Appendix B, p. 20, infra). The Court below, in making findings as to notice independent of and at variance with the master's findings (see footnote 6, p. 7, supra), has completely ignored important evidence including noteworthy omissions of the Bank to produce material evidence in its possession, and has construed as not unfavorable other evidence which clearly is unfavorable to bankrupt.

[10] While counsel for the Bank urged a number of defenses in the Court below, other than absence of notice to the Bank of any intent on bankrupt's part to defraud its creditors—and may attempt to urge such defenses here—such other questions are entirely unimportant in the consideration of this petition for certiorari which is directed to the single error on which the decision of the Court below was based. If any such other defenses have any merit, as we do not believe, they can be considered on the hearing of the case on the merits.

holding the assumption that the corporation making such solicitations on the basis of such "exaggerated" statements of earnings is not thereby guilty of intent to defraud, but is indulging only in legitimate "puffing" or "seller's talk"; because, as is entirely clear, if a bank, hearing such false statement of earnings and suspecting it to be exaggerated, might nevertheless accept such statement as legitimate "puffing" or "seller's talk", the corporation knowingly making such exaggerated statement would not thereby be guilty of fraud. When this assumption which is implicit in the Court's decision is made explicit, the shocking nature of the decision of the Court below is immediately apparent and the propriety of granting the writ for the reasons stated below becomes readily apparent.

I. The Holding of the Court Below Is in Conflict With the Decisions of Other Circuit Courts of Appeal and Contrary to the Accepted Principles Underlying the Law of Fraud.

The decision of the Court below holding that a wilfully false statement of past earnings made to induce investment with the declarant is not fraud is in clear conflict with decisions of the Seventh and Eighth Circuits, under the Securities Act of 1933, holding that a false representation of past earnings or of financial condition, made to induce investments by the public, constitutes fraud. *Securities & Exchange Com. v. Universal Service Assn.*, 106 F. (2d) 232, 235 (CCA 7th); *Holmes v. United States*, 134 F. (2d) 125, 128 (CCA 8th).

The Court's decision is also in conflict with decisions in the Eighth and Ninth Circuits holding that the circulation through the mails to prospective customers of false statements as to earnings realized by a corporation constitutes

proof of the use of the mails to defraud. *Foshay v. United States*, 68 F. (2d) 205, 207 (CCA 8th); *Stephens v. United States*, 41 F. (2d) 440, 442 (CCA 9th).

These Circuit Court of Appeals decisions are in entire accord with the well-settled law of Georgia,[11] the Supreme Court of Georgia having uniformly held that a false representation of a corporation's financial condition or its physical assets, made to induce a sale of corporate stock, is a fraud upon the purchaser. *Huson Ice & Coal Co. v. Thornton*, 143 Ga. 297, 299; *Howard v. Allgood*, 143 Ga. 550; *Williams v. Fouche*, 164 Ga. 311 (5-b), and *Castleberry v. Wells*, 183 Ga. 328, 334 (expressly holding that a false statement by a corporation of its financial condition, made to induce contributions from existing stockholders, is not to be treated as "puffing" or "trade talk," but constitutes a fraud).

The error of the Court below arises apparently from its failure to recognize a very vital distinction, fundamental in the law of fraud, between a statement of opinion and a statement of fact. The distinction is illustrated in a simple example under Section 474 of the *Restatement of the Law of Contracts*, as follows:

> "4. A induces B to contract to buy goods by stating that they had cost him $1,000.00. The statement is false, as A knows. It is fraud. Though statements of *value* are ordinarily statements of opinion, statements of *cost* are not." (Emphasis supplied.)

Exactly the same principle which applies to a false statement of cost applies also to a false statement of past earn-

[11] The Georgia law of course governs, but the Georgia law is in keeping with the general law of fraud. The only material difference in the Georgia law of fraudulent conveyances is that "ground for reasonable suspicion" is equivalent to "knowledge." (See footnote 5, p. 6, supra.)

ings, more especially when stated on a monthly basis and carried out to one one-hundredth (1/100th) of one (1) per cent so as to give the appearance of meticulous accuracy. Such a statement is of a definitely ascertainable fact. If it is knowingly false, and made with intent to deceive, it is clear fraud; and the Bank, or anyone having notice that such statement is false and that it is made with intent to deceive, has notice of the intended fraud. If, "as the Bank may have assumed",[12] bankrupt actually had been prospering and had been only "exaggerating" the amounts of its earnings, the statement nevertheless would obviously have constituted fraud. In the above example from the Restatement of the Law of Contracts, the misstatement of the cost of goods would in the usual case be only an "exaggeration."

Nor is it necessary, in order to charge the Bank with notice of an intent on the part of bankrupt to defraud bankrupt's depositors, that the Bank should have had notice of the whole scope of bankrupt's fraudulent scheme, or that bankrupt was insolvent, or that bankrupt was making no profits, but was losing large sums of money. It is not necessary that the Bank should have known anything other than that bankrupt was soliciting deposits from the public for investment upon claims of earnings as to the falsity of which the Bank had notice.

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[12] In the paragraph of the opinion quoted at p. 9, supra, the Court below stated that it was natural for the Bank to look upon bankrupt's claims of enormous earnings, "though exaggerated," as evidencing that the business carried on by bankrupt was prospering. Even if such a belief would have excused the Bank—as it clearly would not—it is difficult to understand how a national bank can be assumed to have construed a false statement of fantastic earnings as evidencing that the declarant is enjoying prosperity.

II. **The Holding of the Court Below Is of Great Public Importance in Connection With Securities Transactions and the Liability of Banks Financing Fraudulent Enterprises.**

At a time when the whole tendency of legislation and judicial decision is to impose a stricter and stricter duty, not only of honesty but of full disclosure, upon persons inviting investments from the public, a decision of a Circuit Court of Appeals which sanctions as legitimate "puffing" or "seller's talk," "exaggerated" statements of past earnings made for the purpose of inducing investments by the public, or which condones a large national bank in treating such statements as legitimate "puffing" or "seller's talk" although it admittedly suspects their falsity, is of great public importance in a vital field of the law.

It is of the utmost importance that there be no misunderstanding in the financial world that a corporation's willful "exaggeration" of its past earnings is not a statement of opinion, but is the statement of a fact; that it is not permissible "puffing" or "seller's talk," but is obvious fraud.

It is of great public importance also that a bank should not be permitted with impunity to lend its resources and prestige to one engaged in a scheme of securing deposits from the public on a basis of "exaggerated" claims of earnings, where, as here, the bank has knowledge of such claims and actually suspects their falsity. Banks enjoy great privileges and exercise tremendous power. With this power should certainly go the responsibility of not accepting fraudulent transfers from persons whom the bank knows to be soliciting funds from the public upon the basis of false and fraudulent statements as to past earnings. The decision of the Court below could not fail to encourage banks in the unhealthy belief that they owe no responsibility to the investing public for the fraudulent character

of the enterprises which they finance, even when the bank has notice of the intended fraud of such borrowers upon the public.

Petitioner, of course, does not contend that there is any duty upon a bank, which has no notice of intended fraud of a prospective borrower, to make any investigation in that regard. However, when the bank is in possession of knowledge of facts which clearly put it on notice of the borrower's intended fraud upon his creditors, it is of the utmost public importance that the bank should not be encouraged to believe that it can show the callous disregard of the public interest which obviously accompanied the making of the present loans. Mr. Clay, the president of the Bank, when being questioned as to his suspicions concerning bankrupt's claims of enormous earnings, which officers of the Bank admittedly suspected to be false, testified (R. 894):

> "The only thing I paid any attention to was the value of the collateral. I wasn't concerned with whether he was making a profit for his clients or not. That was his clients' business, and not mine."

CONCLUSION.

Petitioner submits that the certiorari should be granted and the decision below reversed for the reasons above stated.

Respectfully submitted,

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Atlanta, Georgia,
Attorneys for Petitioner.

APPENDIX A.

(Letter received by the Bank before any loan was made to bankrupt.)

AMERICAN BOND & SHARE CORPORATION
Investment Securities
William-Oliver Building
Atlanta, Ga.

September 8th, 1933.

Office of
President

Mr. Ryburn G. Clay, President
The Fulton National Bank,
Atlanta, Georgia

Dear Mr. Clay:

During the past week two prospective clients have made inquiries at your Bank in regard to the standing of this Company.

In each instance, these people have been told by some official of the Bank that they knew very little about the American Bond & Share Corporation. In one case, the client was advised that the Fulton Bank had repeatedly asked us for information concerning our company and that they could not secure any data whatsoever from us.

We are also informed by these people that, in each case, the Bank informed them that our business was very hazardous and speculative and that if they were going to trade in stocks and bonds that the Bank saw no reason why they should not do their own trading. You, no doubt, are quite familiar with the cases of people who have attempted to trade on the stock market and lost a great deal of money. This is mainly due to the fact that they lacked

the facilities for securing the necessary information, the proper amount of time to devote to trading and also were deficient in the specialized training in market operations which is usually a prerequisite to success.

In connection with our Trading Syndicate accounts, we wish to call your attention to the results which we have accomplished over a period of the last eight months. The following table of net percentages on the principal which have been earned and paid to our Syndicate participants, over the stated period, would appear to be prima facie evidence of our ability to trade the market intelligently and profitably. Your attention is invited to the fact that the total of these earnings exceeded the Dow-Jones average for the period.

1933	Net Percentage Paid
January	20.24
February	10.12
March	14.72
April	17.02
May	11.04
June	10.58
July	6.44
August	8.28
(Average per month over a period of eight months)	12.30½

We, of course, realize the position in which a Bank is placed by an inquiry of this nature and we could neither ask nor expect any Bank to definitely recommend to a customer that he engage in a speculative enterprise of this nature. We do feel, however, that you can conscientiously inform the inquirer that our relations with you have been entirely satisfactory and that to your knowledge we have been unusually successful in our operations during the past few months.

This letter is being written for the purpose of bringing to your attention a condition which we believe has existed without your knowledge or sanction and we sincerely hope that the matter may be clarified without serious inconvenience to you.

Very truly yours,

AMERICAN BOND & SHARE CORPORATION,

(S) B. R. BRADLEY,

President.

BRB:w

APPENDIX B.

Additional Evidence of Bank's Notice of Fraud.

Very significant portions of the evidence were entirely overlooked or ignored by the Court, and such of it as was mentioned seems to us to have been treated with the same indulgence which prompted the Court's designation of bankrupt's false claim of earnings as "*exaggerated.*"

The Court below does not even mention an extraordinary letter of February 21, 1934, preceding the transfers to secure the last three loans (Exhibit 1 to this Appendix B) written by Bradley to the Bank, in reply to the Bank's inquiry for information about Bradley. In that letter Bradley himself informed the Bank that he was an impostor. The Bank, in reading it, could not have failed to conclude with practical certainty that the claims made in his September, 1933 letter were false and that Bradley was an unmitigated fraud. Contradicting the claims of his earlier letter that he was a financial genius of great experience in stock trading, the second letter clearly indicated that he had no real experience, and certainly no real success, in dealing in securities. On the contrary, he informed the Bank that he had followed the races at various tracks, had participated in various promotions throughout the country, apparently unsuccessful, and had engaged in many miscellaneous occupations (operating a vaudeville theatre, conducting a fish business, running a hotel, selling real estate, etc.) at various places. The Bank's president did believe the contents of the second letter, and well summarized its contents in a letter to a correspondent bank, on April 23, 1934, the day before he made the fourth loan:

> "There has been a *great deal of adverse criticism* regarding Mr. Bradley and we had him give us his entire life history. He has been in practically every

kind of business from oil to horse racing and most of his ventures have been unsuccessful." (Emphasis supplied.)[a]

Inasmuch as the complete text of Bradley's long letter was set out in the record (R. 449-454) and inasmuch as the Trustee's brief laid emphasis upon this letter, it is difficult to understand the unequivocal statement of the Court (R. 982) that, "so far as the record shows," "no new fact or report" came into the Bank's possession before the fifth and sixth loans in addition to that in the Bank's possession when it made the *second, third* and fourth loans. The Court's statement can only be understood by assuming that it overlooked this vitally important evidence which as to the last three loans is conclusive against the Bank on the question of notice.[b]

On December 22, 1933, following the first loan, the Bank's finance committee, as its minutes record, raised the questions "who Bradley is" and "if the securities are legally held" (R. 244). On the same day the Bank's credit manager, knowing from former correspondence that Irving Trust Company was making an investigation of Bradley, wrote Irving Trust Company, saying that "there seems to exist in the minds of some a question as to Mr. Bradley's former connections and activities before coming to Atlanta" and asking for the "results of your investigation" (R. 445-446). On December 28, 1933, Irving Trust

[a] The Court below dismisses the Bank's knowledge of *"a great deal of adverse criticism"* of Bradley as being without significance, where he was "otherwise enjoying a good reputation in his community"—an assumption made by the court without the slightest foundation in the record upon which to base such an assumption.

[b] In this connection the Court adds that the proceeds of the fifth and sixth loans were *"apparently"* employed in "trading on the open market" (R. 982-983). Obviously this is a mere speculation of the Court, and there is not the slightest basis anywhere in the record to support the Court's assumption. Even the Bank itself did not contend that the proceeds of these two loans were used in "trading on the open market" (R. 184).

Company replied, giving the following information, not on its letterhead but *on an unsigned sheet of paper* (R. 238):

> "We have been informed that the past activities of Mr. B. have come under criticism on numerous occasions. Our informants believe that caution should be exercised."[c]

The Bank's Finance Committee on January 2, 1934, in condemning the first loan, refers to "recent unfavorable information" obtained; and again on February 7, between the third and the fourth loans, the Finance Committee's minutes refer to "further unfavorable information" (R. 244).

It was not disputed that the Bank knew the mechanics of bankrupt's operations (R. 407); that it had procured from bankrupt specimens of its contracts with its depositors (R. 255); that the bankrupt had just started in business under Bradley's management (R. 467); that the bankrupt was dominated by Bradley (R. 436); that Bradley was a newcomer in Atlanta (R. 468) and the Bank had been unable to learn anything concerning his antecedents before coming to Atlanta (R. 671); that the bankrupt was actively soliciting deposits in Atlanta and in adjacent rural areas (R. 432, 437); that the Bank had reports that the bankrupt had little financial worth (R. 444, 439-440); and that bankrupt refused to furnish Dun & Bradstreet a financial statement (R. 445), which fact the Bank's credit

[c] Although the letter from the Irving Trust Company accompanying this unsigned sheet stated, *"It was obtained from sources deemed reliable"* (R. 447), the court below dismissed this evidence of notice to the Bank of bankrupt's fraud as being of no significance, for the reason that it "suggests" that Irving Trust Company did not know of "any particular fraudulent transaction" in which Bradley had been involved (R. 981). The court ignored the fact that the Bank requested only the "results" of Irving Trust Company's investigation, and did not request information as to "particular fraudulent transactions" (R. 446). *Detailed proof of fraud certainly is not necessary to give rise to a ground for reasonable suspicion.*

manager testified did not indicate a "healthy situation" (R. 674).

There is a most important *omission* in the Bank's testimony, to which the Court makes no reference whatever. Before making the first loan, the Bank's president had conferred "on several occasions" with bankrupt's broker, Livingston & Company, for the specific purpose of discussing with it proposed loans to bankrupt (R. 876-877). If the testimony of the Bank's president leaves any question as to the time when these conferences took place, the chairman of the Bank's finance committee testified that access to the true facts was "easily" available to the Bank through Livingston & Company (R. 827). Livingston & Company knew of the substantial losses theretofore sustained by bankrupt (R. 265). In the absence of evidence as to what the Bank learned from Livingston, the natural inference is that it learned the truth[a] that the bankrupt had sustained heavy losses, not the fabulous profits claimed—and that the Bank, therefore, before the first loan was made, had actual *knowledge that bankrupt's claims of earnings were utterly false*, and *not suspicion that they were "exaggerated."*

Of importance also is the fact that when the Bank eventually consulted its attorney the loans were promptly called upon receipt of the attorney's opinion (R. 929-930). That opinion was not introduced in evidence.

Against this evidence establishing, as the Court concedes, that the Bank suspected the falsity of bankrupt's enormous claims, the Court summarized the evidence which it considered "favorable" to the Bank: Bankrupt had hundreds of depositors who seemed satisfied and no depositor had made a complaint, and that bankrupt paid

[a] "The production of weak evidence when strong is available, can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character." Stone, Ch. J., in *Interstate Circuit v. U. S.*, 306 U. S. 208, 226.

its bills promptly (R. 980-981);[e] bankrupt maintained an account with another bank and with brokers and enjoyed their confidence and the confidence of the community (R. 979, 981);[f] that the Bank had the report of a local credit reporting company, stating that Bradley, a newcomer in the community, was reputed to be worth $100,000.00, (which the Court concedes was disputed by a Dun & Bradstreet report held by the Bank that Bradley was worth only a "few thousand dollars" [R. 979]), and that bankrupt had a net worth of $5,000.00 (R. 467);[g] that the Bank had made a thorough investigation which resulted in no information constituting a ground for suspicion (R. 980);[h] and that in the spring or summer of 1933 Livingston & Company's representative introduced Bradley to the Bank, saying that Bradley was a shrewd trader who handled his accounts well (R. 978).[i]

[e] These were, of course, conditions absolutely essential to the conduct of a swindle of this type. The failure to observe them would have resulted in immediate collapse.

[f] There is no evidence whatever in the record that bankrupt "enjoyed the confidence" of another bank and brokers. The Bank produced no other banker or broker to testify that Bradley or bankrupt enjoyed its confidence. That bankrupt and Bradley were known to the Bank not to enjoy the confidence of the public is established by the letter of the Bank's president that "there had been a great deal of adverse criticism of Bradley" (R. 455).

[g] Bankrupt claimed to be earning fabulous profits for others, but, as stated in this report, was itself worth only $5,000.00. It is not clear just how the Court arrived at the conclusion that this report was "*especially complimentary*" to bankrupt. The reverse would seem to be true.

[h] The Bank's credit manager testified that he made a number of inquiries and received nothing favorable to Bradley, but did receive the warning from the Irving Trust Company set out (pp. 21-22) above (R. 671, 679).

[i] On March 2, 1933, Livingston & Company introduced Bradley to the Bank to enable Bradley to open a checking account (R. 974, 971). However, this was only two months after bankrupt began operations, approximately ten months before the first loan was made and several months before bankrupt sustained heavy losses in trading with Livingston & Company. The court, while calling attention to this

The Bank did not produce as a witness a single officer or employee who testified that he ever entertained an honest, though mistaken, belief in the truth of bankrupt's claims or that he actually thought bankrupt was dealing honestly with its depositors.

The Bank accepted the transfers in question as security for the loans made, not because it did not entertain the suspicions above suggested, but solely because, being presented with securities in "street" names, with values ample to margin the loans made by it, it was not concerned with whether bankrupt was using the money to conduct a business in fraud of customers. Mr. Clay, the Bank's president, testified that he made the loans, relying "solely and exclusively" upon the possession of good collateral (R. 890), with an ample margin of security (R. 878), that the Bank's finance committee suspected bankrupt's representations as to enormous profits (R. 894, 895), but *that he was not "concerned with whether he (Bradley) was making a profit for his clients or not. That was his clients' business, and not mine"* (R. 894).

March 2, 1933, conversation, wholly fails to call attention to Mr. Clay's failure to testify as to information learned months later when, preceding the making of the loans, he conferred with Livingston & Company on several occasions to determine whether the Bank would make the loans (see page 23, supra).

EXHIBIT 1 TO APPENDIX B.

(Letter received by the Bank between 3rd and 4th loans to bankrupt.)

AMERICAN BOND & SHARE CORPORATION
Investment Securities
William-Oliver Building
Atlanta, Ga.

February 21, 1934

Office of
President

Mr. Ryburn G. Clay, President,
The Fulton National Bank,
Atlanta, Georgia.

Dear Mr. Clay:

Pursuant to our conversation, held last Friday, February 16th, I will attempt to outline in the following paragraphs something of my background before entering business in Atlanta in the fall of 1932.

My father, John M. Bradley, oldest son of William E. Bradley, a direct descendant of William Bradley, Bradlee Castle, County Durham, England, was born in Breathitt County, Kentucky, in the year 1859. Upon reaching manhood, he was employed by the East Tennessee, Virginia, and Georgia Railroad, later becoming construction engineer of the Knoxville-Morristown division of that line.

At the suggestion of a very dear friend of his, Benjamin F. Roden, one of the early settlers of Birmingham, Alabama, he moved to that city in the year 1882 to construct a gas and light plant, later moving his family, then consisting of my Mother and two sisters, there. He became Superintendent and one of the major stockholders of a company known as the Consolidated Electric Light Company of Birmingham. This concern was later taken over by the

Ford, Bacon & Davis Company, of New York City. He continued on with the new company until the year 1910, at which time he retired from active business.

Born in the year 1865, my Mother, Angie M. Biddle, was the oldest daughter of John S. Biddle, of Limestone, Tennessee, then a merchant and the postmaster of the town. She is a second cousin of the Philadelphia Biddles (one of the foremost families of this country); also a first cousin of Bird Robinson, who is now President of the Short Line Railroad Association. Her brother, Will Biddle, was the owner of the Walla Walla Gum Company, of Knoxville, Tennessee, and interested in several other projects of importance in that section.

I am the oldest son of the aforesaid John M. and Angie Bradley and was born in Breathitt County, Kentucky, in 1889, while my Mother was visiting relatives in Kentucky.

I finished high school in the year 1906. Shortly after I ran away from home, going to New York City, where I secured employment with Mr. Alex May, who was a very close friend of my Father and who traded extensively in Wall Street at that time. I remained in New York with Mr. May until the spring of 1907, at which time I returned to Birmingham. Having, by that time, made quite a sum of money for a boy of my age, I felt that I should return in order to show them just how smart I was. I joined a Mr. Hambrick, Mr. Burnett and Mr. Gamble in building the first vaudeville and motion picture house, The Lyric Theatre, of any importance in Birmingham and very promptly lost most of my money.

I returned to New York in the early part of 1908 and again entered the employ of Mr. May as runner and later assumed charge of most of his Curb trading. I remained with Mr. May, with the exception of frequent visits to Alabama and Kentucky, until June, 1911, at which time I was married and went to the Pacific Coast on my honeymoon, remaining there until January, 1912. I then returned to

Birmingham and bought a one-third interest in the Metropolitan Hotel, in association with a Mr. Walter Bennett and a Mr. Robertson; about this time I also purchased a half interest in a stable of race horses. During this period I spent most of my time in New Orleans, Hot Springs, Ark., Louisville and Lexington, Kentucky—the circuit on which we were racing our horses at that time. I sold my interest in the horses in 1916 and returned to New York.

In New York again, I became interested in the promotion of a company known as the Fisheries Products Company. During this period I spent a substantial part of my time in the South. Due to its favorable location and for other reasons, I purchased a home in Atlanta at that time located at 814 N. Boulevard, where my family resided. I, of course, frequently joining them for short periods. I was connected with the financing of the Fisheries Products Company until we had completed the sale of its capital stock, at which time we turned the company over to the stockholders in splendid financial condition, with a Bradstreet rating of AAA No. 1. The company, under the management of its stockholders, later went into receivership and was liquidated.

In the summer of 1918, I became interested, with Bates and Burch Burnett, of Tulsa, Oklahoma, Silas M. Newton, of Richmond, Virginia and New York, A. L. Hawse, of Richmond, Virginia, and several other prominent people of Richmond, Virginia and New York, in several tracts of oil leases in the Cushing field in Oklahoma. We organized a company on the aforesaid leases, The Cushing Petroleum Corporation. This company was financed mostly by ourselves and a few close associates. The stock of this company was listed on the New York Curb Exchange and traded in until the break in oil stocks early in 1920, at which time most of the small oil companies and some of the major companies met with disaster.

I had no further connections of any importance other than trading in the market, which I have done continually

since 1906, until the fall of 1923, at which time I became interested, with J. B. Jeffries, in several land developments in Miami, Florida, namely Shoreland Company (Miami Shores) (Florida Muck Farms) and (Flagler Gardens). No doubt you are familiar with the history of the above.

I reestablished myself in New York in 1926, taking office quarters with Silas M. Newton at 150 Broadway, and became interested in the American Controlled Oil Field, in which Mr. Newton owned the controlling interest. I ran the market in this stock for about two years. Being unable to get the proper cooperation from officers of the company, I withdrew.

I then became interested in the Indiana Southwestern Gas & Utilities Corporation, investing a substantial sum of money in this project, which had made wonderful progress up to the break in the market in 1929. The company found itself in dire need of money and was forced to obtain additional financing. It undertook to secure the additional money through a brokerage house which was recommended by the Central Hanover Bank & Trust Company, said house being Guilbord-White & Company. The financing was being handled in such an amateurish and expensive manner that Mr. Newton clashed with Guilbord-White & Company as well as the Central Hanover Bank & Trust Company; the net result being that the Bank insisted on taking over the controlling interest or appointing a receiver. The Corporation is now in the hands of the Bank.

My next venture was the purchase of 66-⅔% of the capital stock of the Airvia Transportation Company. This company had been formed for the purpose of financing the Williams and Yancey flight to Rome, Italy, which flight, as you no doubt recall, was a success. The company then undertook to put into operation an air line from New York to Boston. Due to bad management, the company had fallen in a bad financial condition. It was at this time that I bought the aforesaid 66-⅔% of the stock, not having had

any previous connection with the company. I immediately reorganized the company, giving it a new name, Olympian Airways, the charter of which was granted in May, 1930. I was elected President of the Olympian Airways and commenced the operation of lines between New York and Boston; New York and Saratoga and New York and Atlantic City, which were operated until the latter part of 1930. Business conditions grew worse from month to month and we finally discontinued the operation entirely.

I had no further business connections in New York, other than my stock market trading, and left there in the early part of January, 1931, in search of some town or city which I thought might offer some business opportunity better than New York had to offer at that time. My trip carried me as far west as Los Angeles. I failed to find any town or community enroute that impressed me and finally decided to return to New York, coming back via the Southern route, stopping off in New Orleans and Atlanta. I was more impressed with business conditions here than I had been anywhere enroute and decided to make a careful survey of this section. I secured a security salesman's license under a concern known by the name of Milner & Company. I made no effort to sell securities and sold none under this license, however, it was necessary to have a license in order to discuss investment plans and opportunities with prospective clients and associates. I bought a car and covered the State of Georgia to assure myself of the possibilities and prospects of going into business in Atlanta.

I came in contact with several people throughout the State that had bought stock in the American Bond & Share Corporation, the company of which I am now President. On further investigation, I found the capitalization of the company to be 50,000 shares with 40,800 shares outstanding. After talking with Mr. C. R. Dawson, C. P. A., who had invested quite a sum of money in the aforesaid company, and having his assurance that the controlling

interest could be acquired, and that there were possibilities of building up a nice business in Atlanta, I spent some four months in acquiring a controlling interest in the American Bond & Share Corporation, assuming charge in September, 1932. The outstanding indebtedness of the company, amounting to about $6,900.00 was promptly liquidated and I set up my first trading account October 1st, 1932. The history of myself, as well as that of the company, since that time I am sure is familiar to you.

I have not been unaware of uncomplimentary rumors regarding me during the past year and trust that the above information, which can be readily authenticated, will serve to answer any questions which may arise in the premises.

Please accept my thanks for the many courtesies which you have extended me during the past several months.

Cordially yours,

(S.) B. R. Bradley.

BRB:w

(7)

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IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS M. STUBBS, AS TRUSTEE IN BANKRUPTCY OF AMERICAN BOND & SHARE CORPORATION,
Petitioner,

—vs—

THE FULTON NATIONAL BANK OF ATLANTA,
Respondent.

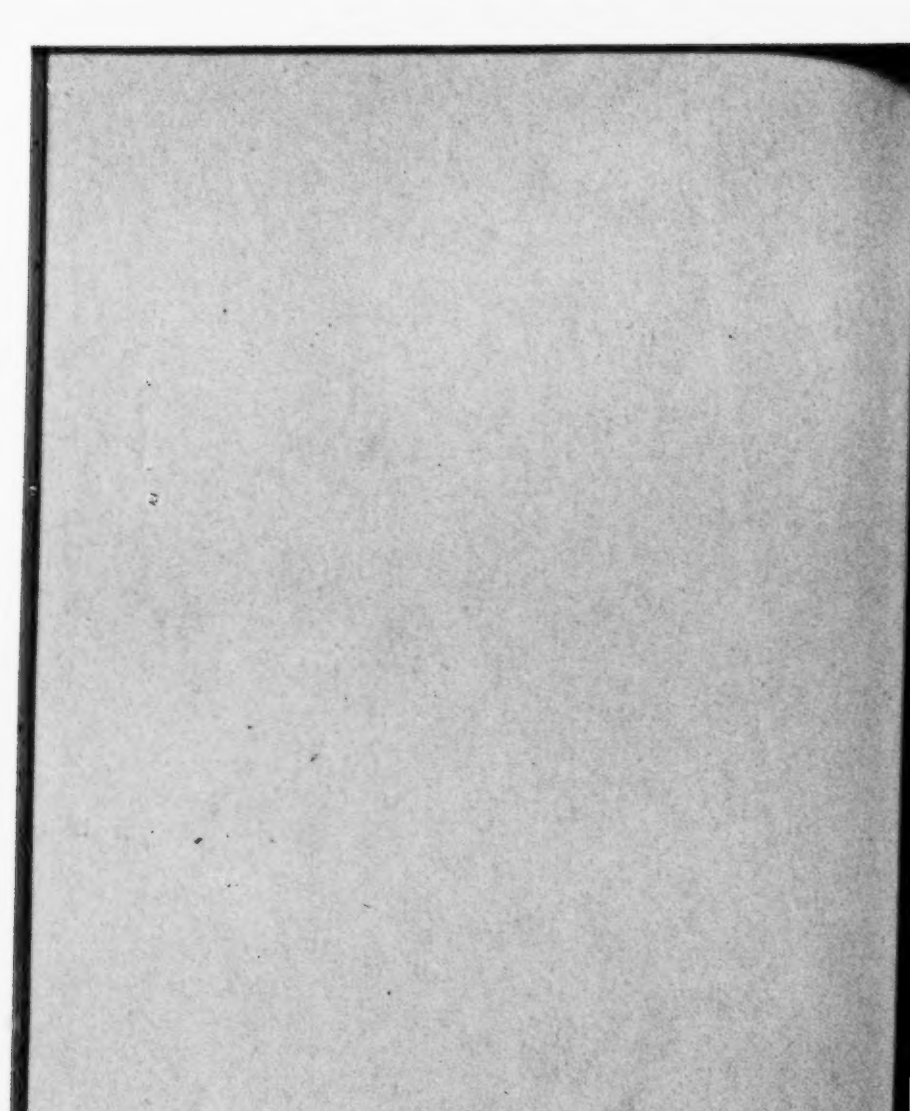
NO. 1205

PETITION FOR CERTIORARI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

MARION SMITH,
DEVEREAUX F. MCCLATCHEY,
Attorneys for Respondent

DAILY - ATLANTA



IN THE

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The petition for certiorari does not make out a case for granting the writ because:

(1) The question stated as being presented is not in fact presented under the record in this case and was not in fact passed on by the Circuit Court of Appeals.

(2) The question actually dealt with by the Court at the point to which the petition for certiorari is directed was not a question of law at all, but a question of fact based on a lengthy record presenting many other features necessary for consideration in this connection and not referred to in the petition for certiorari.

(3) No question of public importance is involved.

(4) No conflict with other Circuit Court of Appeals is involved. The cases from other Circuits cited as involving a conflict are not in point.

(5) No question of federal law is involved. The petition itself shows that the sole question is the application of Georgia statutes to the facts of the particular case.

It is not necessary to discuss each of these propositions separately. It is merely necessary to get before the Court an accurate and at least fairly adequate statement with regard to the present case.

This is a suit attacking certain transfers by the bankrupt to the bank as having been made to defraud creditors. There were no ultimate issues in the case except whether these transfers were made to defraud creditors and under such circumstances that they could be set aside. The transfers were made in connection with loans currently extended. The issue arose out of the following:

The bankrupt was conducting a business of soliciting funds of customers to be used in trading on the market. These funds were delivered to the bankrupt under a series of written agreements which authorized the bankrupt to merge the different deposits, to trade at its discretion with the funds and securities deposited, to conduct this trading in its own name or in any other name which it might desire, and to borrow on the assets thus used in trading. These documents are very lengthy and are not here quoted. They were so construed by the Court (R. p. 976-977) and this construction is not questioned.

The bankrupt actually conducted these trading operations at various brokerage accounts in the City of Atlanta, particularly with Livingston and Company, Courts and Company, and Beer and Company. Under

the authority given to the bankrupt to conduct such trading accounts in other names than that of the bankrupt, accounts were carried in the name of the bankrupt and in the name of B. R. Bradley and in the name of J. S. Hearn.

At the time the loans were made by the bank which are attacked in this case, the bankrupt's business of soliciting customers had attracted a large following and the general belief throughout the community was that the business was being conducted successfully in behalf of customers. While it developed after the bankruptcy that this was not the case, there is no suggestion in the record that at the time the loans were made the bank had any reason to believe that the trading was not successful, although a bank official stated on the stand that while he believed the business was successful and while he had no knowledge that its profits were not as large as the bankrupt claimed, he was skeptical about the actual amount of profits.

In this situation the bankrupt applied to the bank for certain loans for trading purposes. Six loans over a few months were made and paid off and collateral returned, the loans with minor exceptions being made on listed collateral in street names properly endorsed. The aggregate of these loans over the period involved was $120,297.72. The actual disposition of the proceeds of these loans was traced during the trial of this case. The disposition was as follows: $86,675.92 was used by the bankrupt to pay debit balances against its trading accounts at Livingston and Company against the same securities which were put up as collateral at the bank. $3,800.00 was used to pay similar debit balances against the bankrupt's trading account at Courts and Company. $6,000.00 was used to pay a debit balance against the bankrupt's trading account at Livingston and Company in the name of Hearn. $1,800.00 was used for the Livingston and Company account.

$9,186.55 from later notes was used in making payments on earlier notes. Thus all of the proceeds of these notes were traced into the actual trading which was the bankrupt's business, except the relative small amount in the light of the total, of $9,335.25. This amount was untraced for lack of records. There is no suggestion in the evidence that it was used for any other purpose than the business of the bankrupt (R. 183, Exhibit A. This Exhibit adopted by master, R. 222).

As the Circuit Court of Appeals points out (R. p. 983) Bradley, as manager, was, by the series of contracts heretofore pointed out, authorized to have complete possession and control of all securities and funds of the bankrupt, including all left with it by its customers. The securities which were transferred to the bank were under the complete control of Bradley in this capacity at the time of the transfer to the bank. When the notes were paid off they were returned by the bank to Bradley, who was by these contracts authorized to receive them and were thus restored to the exact status in which they had been placed before the transfers to the bank as collateral were made. There was no other place where the bank could return those securities. As the Circuit Court of Appeals points out (R. p. 983) this constituted a complete restoration of the status of the transferred property and as a matter of law a complete defense. This is not referred to in the petition for certiorari.

We, however, undertook to trace what Bradley did with the securities. The total value of securities which were at one time or another placed with the bank is set out as $160,347.46. The evidence shows without dispute that of this amount, after the notes were paid and the securities returned to Bradley, he placed $144,-028.48 of securities in the trading accounts with brokers in Atlanta where the bankrupt's trading was conducted. This is exactly where they had been before

they were placed with the bank temporarily as collateral. Securities amounting to $8,115.00 were returned to customers. The evidence does not disclose the ultimate disposition by Bradley of $8,203.98 of securities. (R. 950. The exhibit there set out not in dispute.)

Thus the proof shows without dispute that the loans made by the bank were practically in their entirety used for the trading purposes for which the bankrupt was in business and that the securities transferred to the bank were, after the loans were paid, returned to Bradley and by him put back into the trading operations. To a very slight extent, in proportion to the whole, the tracing was not complete but to a slight extent only, and as to that there was no evidence suggesting an improper use of the funds or securities. The primary defense therefore of the bank throughout is and has been that, regardless of what misconduct may be charged to the bankrupt in other matters, as was only disclosed by events occurring long after these loans were made, the undisputed evidence shows the particular transactions with the bank were not made with a purpose to defraud creditors and did not in anywise deplete the assets of the bankrupt. As to this the evidence is without dispute and all of this is clearly recognized in the Circuit Court of Appeals' decision.

Indeed it has never been seriously contended in this case that the transfers to the bank did deplete in any way the assets of the bankrupt.*

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* *1 Glenn, Fraudulent Conveyances and Preferences 348:*

"The real test of a fraudulent conveyance, on the contrary, is the unjust diminution of the debtor's estate."

27 C. J. 469:

"In order that a conveyance or transfer may be attacked as being fraudulent and void as to creditors, it is necessary, even where there is an actual fraudulent intent, that prejudice to the rights of creditors shall result therefrom."

24 Am. Jur. 166:

"A very general test or criterion as to the character of a con-

In the light of the foregoing, we may now briefly examine petitioner's statement of what is claimed to be the question in the case. We first note that the petitioner's reference in this statement of the supposed question to "a national bank, which assists in financing" is totally misleading as applied to the relation of the bank here to the bankrupt. In a very general sense, any bank which lends anyone money can loosely be spoken of as assisting that person in financing, but no court has ever supposed that by doing so the bank thereby assumed responsibility for what its customer was doing. To accept such a duty would hold the bank liable for the activities of any customer to whom it lent any money. The mental picture created by the petitioner's expression of "a national bank, which assists in financing the operations" is that of a bank cooperating far beyond merely making a few current loans on listed collateral and is not justified by anything in the record.

The basic error in the petitioner's statement of the supposed question is that when speaking of fraud petitioner in no way limits the issue to an intent to defraud *in the transfers to the bank which are attacked in this suit;* and unless so limited the question actually involved is totally missed. It is not here a question of whether the bankrupt's misrepresentation to its customers of its profits was such misrepresentation as

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veyance or transfer by a debtor is whether it operates to diminish his assets."

Space does not permit a review of decisions. They support the statements in the above texts.

No injury to creditors results where, as here, the proceeds of the loans made on the transferred securities are used to pay debts of the debtor and put into his business operations and the collateral returned.

The Master here made a finding that it was "immaterial" whether creditors were injured by the transfers attacked in this case. (R. 138). He also recorded in his report that he was shocked at the injustice of his own conclusions. (R. 136). It is not surprising, therefore, that his conclusions were not sustained.

would render the bankrupt liable to customers or subject to discipline by the Securities and Exchange Commission. Of course such misrepresentation would have these consequences. No one has ever claimed the contrary and certainly the Circuit Court of Appeals meant nothing to the contrary.

The question here is whether a doubt on the part of a bank officer that the bankrupt was correctly stating its earnings was sufficient to carry to the bank notice that *the particular transactions with the bank*, which were normal loans to carry on the bankrupt's business, were transfers to hinder, delay and defraud creditors. This is a different question from the one propounded by the petition for certiorari. It deals, as it should deal, with the *question of fraud in the particular transactions involved*. That, of course, is what the Circuit Court of Appeals was considering. Its language must be construed in the light of the issue actually before it and of the case actually being decided. So construed the language seems to us clear; but in any event the ruling is clear, and the pressure on this Court's time is much too great to justify the granting of a writ because of criticism of the language used by a Circuit Court of Appeals in expressing a correct result.

Judge Lee's opinion makes it clear that what he was dealing with at this point was whether the fact that a bank official doubted that the earnings had been correctly stated was sufficient to charge the bank with knowledge "that the transfers were made for the purpose of defrauding creditors" (R. 980). It cannot therefore be treated, as the petition for certiorari suggests, as conflicting with rulings that misrepresentation as to earnings would justify action by the Securities and Exchange Commission or criminal prosecution if the mails were used; hence there is no conflict with the decisions of other circuits cited by petitioner.

Since we are here dealing with a case charging transfers with intent to hinder, delay and defraud creditors,

the question before the Circuit Court of Appeals is one that cannot be answered as an abstract question of law, but is a question of fact to be considered in the light of the whole record in the case. That record is in two volumes. Any attempt to summarize the evidence at this point would expand this brief beyond reasonable limits. The writ of certiorari is not intended to be used to bring before the court factual questions involving elaborate studies of long records where the question though of importance to the parties is not of importance to anyone else.

While no effort is made to summarize the proof, we do point out that the facts stated in the opinion of the Circuit Court of Appeals are fully sustained by uncontradicted proof and show among other things that the transfers were not made with any intent to defraud creditors and did not in fact defraud creditors since they did not deplete the bankrupt's assets or withdraw any assets from the reach of creditors. This alone is sufficient to sustain the court's conclusion that the statement of the bank officer that he was skeptical about the amount of profits, though he had no knowledge on the subject, was not enough under this record to invalidate such transfers to the bank on the charge that they were made with intent to defraud creditors.

Respectfully submitted,

MARION SMITH,
DEVEREAUX F. MCCLATCHEY,
Attorneys for Respondent.

1045 Hurt Building
Atlanta, Georgia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1205.

THOMAS M. STUBBS, As Trustee in Bankruptcy of American Bond & Share Corporation, *Petitioner*,

v.

FULTON NATIONAL BANK OF ATLANTA, *Respondent*.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY MEMORANDUM OF PETITIONER.

CLARENCE H. CALHOUN,
MADISON RICHARDSON,
WILLIAM A. SUTHERLAND,
Attorneys for Petitioner.

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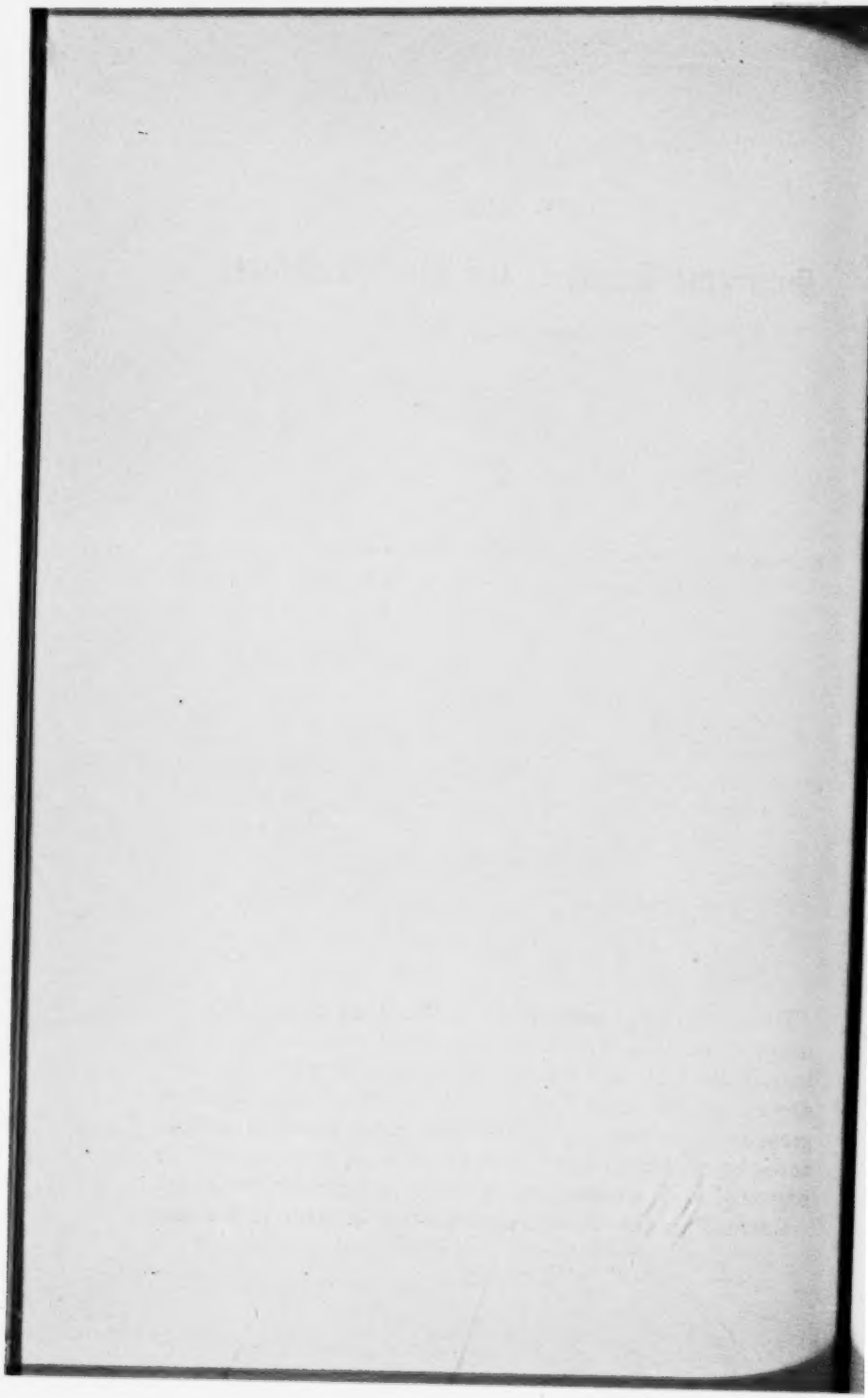

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It is significant that counsel for the Bank do not even attempt to sustain the decision of the Court below on the basis of the facts and the legal premise upon which the decision rests. The brief in opposition urges entirely different grounds of defense—grounds which were urged in and ignored by the Court below and which seem to us to have no proper place in a consideration of the petition for certiorari.

Counsel for the Bank are completely in error in the con-

tention that the consideration of the petition for certiorari by this Court would require any examination of the long record in the case. The petition was carefully drawn so as to avoid any question or ground which might conceivably require an examination of the evidence. The factual issues suggested in the brief in opposition—and a number of the facts are not correctly stated—do not relate at all to the ground upon which the decision of the Court below rests and upon which the petition for certiorari is based.[1]

The decision of the Court below rests squarely upon the legal holding—which petitioner asserts to be erroneous—that false claims by bankrupt of enormous past earnings, made by bankrupt for the purpose of deceiving customers into investing with the bankrupt, were not notice to the Bank of fraud, although the Bank had knowledge of such statements and suspected them to be false. The public importance of this holding and its conflict with the holdings of other Federal Courts are the only issues presented by the petition.

Ignoring the opinion of the Court below, the brief in opposition (pp. 6-7) assumes that the Court below could not have failed to recognize that bankrupt, in inviting investments from the public on the basis of false statements of past earnings, was guilty of fraud against its customers, making it liable to them, and likewise guilty of fraud under the Securities Act and the mail fraud statutes. It assumes also that the Court below could not have failed to recognize that the Bank, having notice that investments were being solicited upon such basis, had notice of the bankrupt's fraud on customers. Having made these assumptions, counsel for the Bank attempt to rationalize the decision of the Court below, in favor of the Bank, as holding that the particular

[1] While we would welcome a careful reading by the Court of Appendix B to the petition for certiorari, which gives a brief summary of much additional compelling evidence of notice to the Bank of fraud, no consideration of the evidence set forth in Appendix B, or of any other evidence, is necessary to a decision on the petition for the writ.

transfers here in question, while admittedly made solely for the purpose of securing funds for the carrying on of the bankrupt's business, an integral part of which was the solicitation of investments from the public upon the basis of fraudulent statements of past earnings, were not themselves tainted with the fraud inherent in bankrupt's plan of operations. The Bank apparently contends—by what odd circumstance, it does not state—that these particular transfers to it were islands of purity in a sea of fraud.

Clearly, the decision of the Court below is not based upon any such theory. The Court below did not even admit that the Bank had notice that bankrupt was defrauding its customers. The Court's position in that regard was based squarely on its erroneous view that the bankrupt's false statements of past earnings were not themselves fraudulent, but constituted legitimate "puffing." Naturally, therefore, the Court did not suggest, as counsel for the Bank would indicate, that the transfers in question were free of fraud because of isolation from the fraud on customers. There is no statement in the opinion which even tends to support Respondent's attempted rationalization of the decision below.

The suggestion in the brief in opposition that the return to bankrupt of the property transferred was relied upon by the Court below as an independent ground of defense, is entirely without justification (brief in opposition, p. 4). The Court below, having held that the Bank—because it had no notice of fraud—was not liable on the original transfers to it, held that the re-transfers of the securities to bankrupt when the loans were repaid "were not improper and invalid" (R. 983), and that the repayment to the Bank of its loans did not constitute fraudulent conveyances.[2] *Assuming the premise* upon which the Court was proceeding, that

[2] The transfers of money in repayment of the loans were charged as fraudulent conveyances in the second count of the complaint in the District Court. A consideration of that count is not involved in a consideration of the petition for certiorari.

the Bank had no notice of fraud on the part of the bankrupt, obviously the return of securities by the Bank to the bankrupt upon the repayment of the loans would create no liability upon the Bank; and the Trustee never contended otherwise. But the Court below nowhere suggests that if the original transfer constituted a fraudulent conveyance for which the Bank was liable, the Bank would have relieved itself of that liability by the return of the property to bankrupt; nor does the Court anywhere suggest, as the last paragraph of the brief in opposition would indicate, that depletion of the bankrupt's assets is a necessary element of the right to recover for a fraudulent conveyance.[3]

The decision of the Court below rests squarely upon that Court's misconception as to what, in law, constitutes fraud in securities transactions. The writ should be granted for the reasons stated in the petition.

Respectfully submitted,

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[3] While it has no proper place in a consideration of the granting of the writ here prayed, it is clear that a fraudulent transferee of property must return it to creditors without any repayment of the loan which it secures. *Cf. 1 Glenn, Fraudulent Conveyances and Preferences*, p. 529, Sec. 303. It should therefore be obvious that a fraudulent transferee, one who has notice of the transferror's intention to defraud his creditors and who thus becomes a trustee *ex maleficio* for such creditors, does not, as Bank's counsel suggest, relieve himself from this liability to account to such creditors by returning the property to the fraudulent transferror *upon repayment of his loan.*